

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

MICHAEL SMITH,	)	
	)	
Claimant,	)	<b>IC 03-519439</b>
v.	)	
	)	
WESTERN AIRCRAFT,	)	<b>FINDINGS OF FACT,</b>
	)	<b>CONCLUSIONS OF LAW,</b>
Employer,	)	<b>AND RECOMMENDATION</b>
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY,	)	<b>FILED JUNE 10 2005</b>
	)	
Surety,	)	
Defendants.	)	
	)	

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**INTRODUCTION**

The Idaho Industrial Commission assigned this matter to Referee Douglas A. Donohue pursuant to Idaho Code § 72-506. He conducted a hearing in Boise on December 15, 2004. Richard S. Owen represented Claimant. Monte R. Whittier represented Defendants. The parties presented oral and documentary evidence. They then submitted briefs. The case came under advisement on March 21, 2005, and is now ready for decision.

**ISSUES**

As modified and agreed upon by the parties at hearing, the issues to be resolved are:

1. Whether the condition for which Claimant seeks benefits was caused by the industrial accident or was caused wholly or in part by a pre-existing condition or subsequent intervening cause.
2. Whether and to what extent Claimant is entitled to benefits for:

- (a) temporary disability, and
- (b) medical care.

3. Whether apportionment for a pre-existing condition is appropriate.

### **CONTENTIONS OF THE PARTIES**

Claimant alleges he sustained a back injury on September 13, 2003, while rapidly washing an aircraft for Employer. He suffers continuing pain. Due to the pain from his herniated disk, Claimant is entitled to surgery and further medical treatment as well as temporary disability benefits until he reaches medical stability.

Defendants agree that Claimant had a work-related accident on September 13, 2003. They contend Claimant suffered a lumbar strain and returned to baseline after his September 13, 2003, work-related accident before suffering a second accident while vacuuming at home on October 26, 2003. Hence, Claimant is not entitled to medical care or temporary disability after the latter date. Moreover, he had a longstanding pre-existing back condition to which an apportionment should be made.

### **EVIDENCE CONSIDERED**

The record in this matter consists of the following:

- 1. The testimony of Claimant;
- 2. Claimant's Exhibits 1 through 9;
- 3. Defendants' Exhibits A through H;
- 4. The post-hearing depositions of Miers Johnson, M.D., and Ralph Sutherlin, D.O.

Objections at the depositions of Drs. Johnson and Sutherlin are overruled. Having considered all of the above evidence, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

### **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 2**

## **FINDINGS OF FACT**

1. In February 1998, Claimant began working for Employer. He washed and detailed executive aircraft and small commuter planes.

2. Claimant had suffered a back injury working for a prior employer in 1989. He underwent a lumbar laminectomy then. Intermittent symptoms remained.

3. While he worked for Employer – prior to his September 13, 2003, industrial accident – Claimant sought medical treatment for his back a number of times. Sometimes a precipitating event was mentioned; sometimes not. Some medical notes specified right low back pain. Temporary restrictions were sometimes imposed. His last visit before the subject accident occurred in May 2003, and the pain resolved after a few days. The medical records sometimes refer to Claimant's back symptoms as "chronic."

4. On September 13, 2003, Claimant was using a brush with a long handle and a five-gallon bucket of soapy water to wash the fuselage and wings of an aircraft. He bent and felt immediate pain.

5. Claimant sought treatment for his back. Employer regarded this as a work-related accident, and benefits were paid.

6. On September 15, 2003, Claimant was diagnosed with an acute lumbar strain and spasm for his complaint of right low back pain. He was restricted to modified work which included a 10-pound lifting restriction and avoidance of certain motions.

7. He improved through visits until October 14, 2003. The medical note indicates Claimant "reports symptoms essentially resolved, and he has returned to baseline." Claimant had stopped medication and was able to tolerate normal activities. This was considered a "resolved lumbar strain," and Claimant was released to full work. On all 4 visits from

September 15 to October 14, Claimant was seen by Robert Gatchel, P.A.C.

8. At hearing, Claimant testified he asked for the work release. Also, when he returned to work, he was able to get “assistance from members of the maintenance team.” He elaborated on his October 14 symptoms:

Just – I would call it where it felt whatever was bothering, the parts that were hurting before were at a point where that I thought I was quite capable of going back. They weren’t gone. They didn’t disappear. But they were workable, in my mind.

9. Claimant testified that in late October 2003 while vacuuming:

I reached down to pick up a sock so I wouldn’t suck it up into the vacuum. And that same pain like when I lifted that bucket on the wash, I got – it was either as equal or a little bit more. But it was like all over again, like déjà vu. Bam, here it goes. I knew it was the same pain, the same thing. So that was on a Sunday, if I’m not mistaken.

Dr. Sutherlin’s note of October 28, 2003, provides a consistent history:

[Claimant] states that two days ago, over the weekend, he was lifting laundry and vacuuming at home when he developed a sharp pain to the right lateral aspect of his lumbar region in the same location as his original injury.

Dr. Sutherlin again diagnosed a lumbar strain and again provided temporary restrictions. He noted Claimant “does realize that he was asymptomatic after an occupational injury and this exacerbation was done at home and may not be covered by Workman’s comp.” Employer did not consider the event to be a work-related accident.

10. When Claimant returned to Employer, he was given a different position. He became - and currently remains - a permanent parts runner, i.e., using a hand truck with a basket on it, he distributes needed parts throughout the hangars. His wages are being gradually reduced i.e., from his original \$18.00 per hour to \$16.00, then \$14.00 and finally to \$12.00.

11. A November 3, 2003, lumbar spine X-ray showed “very significant” disk disease

#### **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 4**

with narrowing at L3-4 and L4-5.

12. Rick Roberts, M.D., saw Claimant on November 6, 2003, for back pain. He noted Claimant reported pain “radiating to the right groin/thigh area.” His subsequent treatment included a series of epidural steroid injections. A November 10, 2003, MRI of the lumbar spine revealed a herniated disk at L4-5 with a large extruded disk fragment impinging the L4 nerve root.

13. On November 11, 2003, Dr. Johnson examined Claimant, reviewed his MRI, and opined:

I feel that his symptoms are compatible with a recurrent disk herniation at L4-L5, only on the opposite side from his previous surgery reported to be at L4-L5 on the left side. He has a degenerative disk present, which certainly would tend to cause recurrent back pain.

14. On December 11, 2003, Dr. Johnson released Claimant to return to light-duty work. Over time, he and Dr. Roberts adjusted Claimant’s restrictions.

15. On January 6, 2004, Dr. Roberts opined:

[Claimant] stated on our first encounter that his back pain never did go away completely. It was certainly exacerbated by his housework. I suspect the disk injury was present at the time on his evaluation through workman’s compensation as he was experiencing radicular symptoms into his right leg at that time. I cannot definitively say which event was the most likely to have led to his current situation.

Dr. Roberts deferred his opinions to those of Dr. Johnson. He prescribed additional injections.

16. On August 19, 2004, Dr. Johnson adjusted Claimant’s restrictions for the last time to lifting no more than 40 pounds with limited squatting and bending.

17. Dr. Johnson opined Claimant had significant degenerative disk disease, would continue to have pain and would probably need surgery. He opined:

I think he had a herniated disk from his injury at work, lifting the bucket. I

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 5**

believe that it got better with the anti-inflammatory medications and the epidural steroid injections symptomatically. But the disk herniation was still present. And then when he bent over to pick up the sock, he just merely aggravated it again and caused a recurrence of symptoms. And this can occur with trivial things, such as picking up a sock. I think that making a case that picking up the sock is equivalent to lifting a bucket in a bent position is not very likely. I think that picking up the sock just happened to be a trivial everyday type activity that just happened to set it off that day.

18. Dr. Johnson explained the etiology of Claimant's conditions and how they interrelated. He considered the work injury the most likely cause of Claimant's herniated disk.

19. Dr. Sutherlin opined Claimant suffered a strain at work and the vacuuming incident constituted a new injury. He acknowledged that "specifically bending over to pick up the sock may not have truly created this protrusion" but considered it one factor of many involved in causing Claimant's condition. He disagreed with Dr. Johnson's opinion of causation.

### **DISCUSSION AND FURTHER FINDINGS**

20. **Causation.** A claimant must prove he or she was injured as the result of an accident arising out of and in the course of employment. Seamans v. Maaco Auto Painting, 128 Idaho 747, 918 P.2d 1192 (1996). Proof of a possible causal link is not sufficient to satisfy this burden. Beardsley v. Idaho Forest Industries, 127 Idaho 404, 901 P.2d 511 (1995). A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. Langley v. State, Industrial Special Indemnity Fund, 126 Idaho 781, 890 P.2d 732 (1995).

21. A preexisting disease or infirmity of the employee does not disqualify a workers' compensation claim if the employment aggravated, accelerated, or combined with the disease or infirmity to produce the disability for which compensation is sought. An employer takes the employee as it finds him. Wynn v. J.R. Simplot Co., 105 Idaho 102, 666 P.2d 629 (1983).

### **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 6**

22. In the present case, Claimant and Defendants agree that there was a work-related accident on September 13, 2003. However, Claimant asserts it was a herniated disk while Defendants assert lumbar strain. Moreover, they disagree as to the further intertwined issues of causation, pre-existing condition and apportionment.

23. More than a decade ago, in March of 1989, Claimant had a work-related accident and a successful laminectomy at L4-5 was performed. Nevertheless, over the years, Claimant has had recurrent back symptoms. Claimant's pattern of back problems pre-dated his industrial accident of September 13, 2003.

24. Claimant suffered a herniated disk on September 13, 2003. The conservative care Claimant received in September and early October 2003 and his amelioration of symptoms during that period does not demonstrate he suffered only a muscle strain. No X-ray, MRI or similar testing was performed. Dr. Johnson's opinions and underlying rationale supporting them are persuasive. He well explained how a protruded disk often produces varying symptomatology consistent with Claimant's course of treatment. Dr. Sutherlin expressed some equivocation in assigning causation between the industrial accident and the vacuuming incident. This did not undercut the weight assigned to his ultimate opinion of causation. Rather, it demonstrates his care and forthrightness in tendering his opinion. Faced with brief visits which provided conservative care but which included no testing to show the absence of a disk herniation in September and October 2003 – coupled with Dr. Johnson's lucid explanation for Claimant's varying symptomatology – the record supports a finding that Claimant's disk herniation was caused by the industrial accident.

25. The subsequent vacuuming incident was a temporary aggravation of the industrial injury. It was not a new or independent injury. It merely altered the symptomatology Claimant

experienced from the herniated disk. The herniated disk was the injury.

26. **Pre-existing condition and apportionment.** Under Idaho Code § 72-406 (1), an employer is absolved from liability for that portion of a permanent partial disability that is due to a preexisting physical impairment. Eacret v. Clearwater Forest Industries, 136 Idaho 733, 735, 40 P.3d 91 (2002). The findings above demonstrate the presence of a pre-existing condition. However, here the question of permanent impairment and disability was not raised. Therefore, prospective apportionment of such is unripe.

27. **Medical Benefits.** Idaho Code § 72-432 (1) defines eligibility for medical benefits. It is for the physician, not the Commission, to decide whether the treatment was required. The only review the Commission is entitled to make of the physician's decision is whether the treatment was reasonable. Sprague v. Caldwell Transportation, Inc., 116 Idaho 720, 779 P.2d 395 (1989).

28. Having found the September 13 industrial accident caused Claimant's disk herniation, Defendants are liable for related medical treatment. Dr. Johnson opined that Claimant will probably need surgery. Dr. Johnson's opinions about treatment are reasonable.

29. **Temporary Disability.** Idaho Code § 72-408 provides that income benefits for total and partial disability shall be paid to disabled employees "during the period of recovery." The burden is on a claimant to present evidence of the extent and duration of the disability in order to recover income benefits for such disability. Sykes v. C.P. Clare and Company, 100 Idaho 761, 605 P.2d 939 (1980). Once a claimant establishes by medical evidence that he is still within the period of recovery from the original industrial accident, he is entitled to temporary disability benefits unless and until such evidence is presented that he has been released for work, or light-duty work and the employer makes light-duty work available to him.

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Malueg v. Pierson Enterprises, 111 Idaho 789, 727 P.2d 1217 (1986).

30. As of the date of the hearing, Claimant continued to work for Employer in a modified position based upon the restrictions provided by Dr. Johnson. Claimant's original hourly wage of \$18.00 is gradually being reduced to \$12.00.

31. The date of medical stability was not an issue for hearing. The evidence shows Claimant was recovering and his restrictions were changing at least until August 19, 2004. Whether he was stable on or after that date remains an issue to be decided at a future time. It is unclear the precise dates upon which Claimant's incremental wage reductions occurred. Throughout his period of recovery – at least through August 19, 2004 – Claimant is entitled to temporary partial disability for the difference in wage, if any, which occurred as a result of accepting the light-duty job.

### **CONCLUSIONS OF LAW**

1. Claimant suffered a work-related accident on September 13, 2003, while washing an aircraft. Claimant's condition, a herniated disk, was caused by this accident. The vacuuming incident did not constitute a new accident or separate injury.

2. Claimant had a pre-existing back condition. The question of apportionment is unripe.

3. Claimant is entitled to all necessary and reasonable past, present and future medical care. This medical care includes - but is not limited to - possible future back surgery. Employer is to be credited with any amounts paid.

4. During his recovery from the industrial accident, Claimant is entitled to temporary partial disability benefits for any reduction of wages sustained as a result of the wage difference between his job at the time of injury and his light-duty job. A determination of the date of

### **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 9**

medical stability is unripe.

### RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing Findings of Fact and Conclusions of Law as its own and issue an appropriate final order.

DATED this 27<sup>TH</sup> the day of May, 2005.

INDUSTRIAL COMMISSION

/S/ \_\_\_\_\_  
Douglas A. Donohue, Referee

ATTEST:

/S/ \_\_\_\_\_  
Assistant Commission Secretary

### CERTIFICATE OF SERVICE

I hereby certify that on the 10<sup>TH</sup> day of JUNE 2005, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION** was served by regular United States Mail upon each of the following persons:

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db

/S/ \_\_\_\_\_